

3  
No. 94-1539

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER Term, 1984

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

**RUDY BLADEL**

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE APPELLATE DEFENDER OFFICE

BY: **F. Martin Tieber**, (P25485)  
Deputy Defender

**Ronald J. Bretz**, (P26532)  
Assistant Defender  
720 Plaza Center  
125 W. Michigan Avenue  
Lansing, MI 48913  
(517) 373-2453

Counsel for Respondent

14/02

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. SHOULD THIS COURT NOT REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT WHICH RESTS UPON SEPARATE, INDEPENDENT AND ADEQUATE STATE GROUNDS?
- II. DID THE MICHIGAN SUPREME COURT ACCURATELY INTERPRET THE MICHIGAN AND FEDERAL CONSTITUTIONS IN HOLDING THAT AN ACCUSED WHO HAS REQUESTED COUNSEL AT HIS ARRAIGNMENT CANNOT BE SUBJECTED TO LATER POLICE INTERROGATION UNTIL COUNSEL HAS BEEN MADE AVAILABLE, UNLESS THE ACCUSED INITIATES FURTHER COMMUNICATIONS WITH THE POLICE?

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## COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's statement, but adds the following from the Michigan Supreme Court decision in this case:

"Defendant was arraigned on Friday, March 23, 1979, in the presence of Detective Raml. Defendant requested that counsel be appointed for him because he was indigent. A notice of appointment was mailed to a law firm that day, but was not received until Tuesday, March 27, 1979. Defendant was not informed during the interim that counsel had been appointed, although he inquired several times." Petitioner's Appendix 5a.

### REASONS FOR DENYING THE WRIT

#### I. THIS COURT SHOULD NOT REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT WHICH RESTS UPON SEPARATE, INDEPENDENT AND ADEQUATE STATE GROUNDS.

The decision of the Michigan Supreme Court was based upon the Sixth and Fourteenth Amendments and upon Article 1, Section 20 of the Michigan Constitution.<sup>1/</sup> Because the Court gave equal emphasis to the state constitutional provision, it is clear that the Court's decision rested alternatively on separate, adequate and independent state grounds. Accordingly, this Court is without jurisdiction to decide the instant case.

In Michigan v Long, 458 US 966; 103 S Ct 3469, 3476; 77 L Ed2d 1201, 1214 (1983), this Court held that where it is claimed that a state court opinion rests upon independent and adequate state grounds, this Court has the authority to review the merits of the case if:

"...a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion...."

Conversely, this Court will not attempt to review a state court decision if the state court "...indicates clearly and expressly that [the opinion] is alternatively based on bona fide separate, adequate and independent grounds." Id.

In its decision below, the Michigan Supreme Court did predicate its decision alternatively on the adequate and independent state constitutional right to

<sup>1/</sup> U S Const, Ams VI, XIV; Const 1963, art 1, 520.

counsel. The Court clearly stated that its decision was not based solely or even primarily on the federal constitution. The Michigan Supreme Court stated its holding as follows:

"We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only to hold that at a minimum, the Edwards/Paintman<sup>2/</sup> rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate." See Petitioner's Appendix, 23a.

\* \* \*

"We have merely extended the Edwards/Paintman rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art 1, § 20." See Petitioner's Appendix 26a.

Thus, the Michigan Supreme Court, in keeping with the holding of Michigan v Long, supra, did clearly announce that the basis for its decision "by analogy" was its interpretation of the federal and state constitutions. This decision was consistent with the Michigan Court's tradition of providing greater protections to the accused in dealing with the police. As early as 1929, the Michigan Supreme Court recognized the right to counsel during police interrogation. People v Cavanaugh, 246 Mich 680; 225 NW 501 (1929), and has extended the right to counsel to any identification procedure after the accused is in custody. People v Franklin Anderson, 389 Mich 155; 205 NW2d 461 (1973). Finally, the Michigan Supreme Court has held that Miranda<sup>3/</sup> warnings must be given in any situation where the accused is the focus of the police investigation even if there is no custody. People v Reed, 393 Mich 342; 224 NW2d 867 (1975), cert den, 422 US 1044, 1048; 95 S Ct 2660, 2665; 45 L Ed2d 696, 701 (1975). The ruling in the instant case prohibiting police-initiated interrogation after the accused has requested counsel at arraignment, is merely an extension of prior Michigan Supreme Court decisions respecting the right of the accused to choose to deal with the state through an attorney.

Another factor considered by this Court in Michigan v Long, supra, was the

2/ Edwards v Arizona, 451 US 477; 101 S Ct 1880; 63 L Ed2d 378 (1981); People v Paintman, 412 Mich 513; 315 NW2d 413 (1982), cert den, 456 US 995; 102 S Ct 2280; 73 L Ed2d 1292 (1982).

3/ Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

Michigan Supreme Court's exclusive reliance on federal law. 103 S Ct at 3474. In the instant case, the Michigan Supreme Court reviewed all available precedent, both federal and state. Indeed, one case, State v Sparklin, 296 Oregon 85; 672 P2d 1182 (1983), involved an extensive discussion by the Oregon Supreme Court on the right to counsel under the Oregon state constitution. Thus, unlike its decision in Long, the Michigan Supreme Court did not rely exclusively on federal law in the instant case.

Respondent recognizes that the Michigan Supreme Court did cite primarily federal decisions. However, this fact alone does not establish that the Michigan Supreme Court "decided the case the way it did because it believed federal law required it to do so." 103 S Ct at 3475. It merely establishes that most of the decisions on the right to counsel during interrogation have been federal cases. The Michigan Supreme Court, as it should, surveyed all of the state and federal decisions prior to reaching its own decision.

As this Court noted in Long, it is not inclined to render advisory opinions. Quoting from Herb v Pitcairn, 324 US 117, 124; 65 S Ct 459; 89 L Ed 739 (1945), this Court stated in Long:

"[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." 103 S Ct at 3476.

It seems clear that even if this Court were to reverse the decision of the Michigan Supreme Court on federal grounds, the decision under the Michigan constitution would not change. Four of the seven justices of the Michigan Court signed the lead opinion which, as noted, was equally based upon the state and federal constitutions. There is absolutely no indication that this majority "felt compelled" by the federal constitution nor that they would change their interpretation of the state constitution. If this Court grants certiorari and reverses the decision of the Michigan Supreme Court, its opinion will most likely be advisory.

Finally, if there is any doubt as to whether the Michigan Supreme Court intended to establish adequate and independent state grounds, Justice Ryan (dissenting) settled the issue by stating his objection to the Court's holding based on the state constitution. Justice Ryan stated:

"I concur in part III-C of my brother Cavanaugh's opinion with the exception, however, that since the Edwards/Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed,

inappropriate to base the result in these cases upon [Michigan] Const 1963, art 1, § 20." See Petitioner's Appendix 33a.

**II. THE MICHIGAN SUPREME COURT ACCURATELY INTERPRETED THE MICHIGAN AND FEDERAL CONSTITUTIONS IN HOLDING THAT AN ACCUSED WHO HAS REQUESTED COUNSEL AT HIS ARRAIGNMENT CANNOT BE SUBJECTED TO LATE POLICE INTERROGATION UNTIL COUNSEL HAS BEEN MADE AVAILABLE, UNLESS THE ACCUSED INITIATES FURTHER COMMUNICATIONS WITH THE POLICE.**

In its decision below, the Michigan Supreme Court held the following:

- 1) At the time of Respondent's confession, his right to counsel had attached under both the Fifth<sup>4/</sup> and Sixth Amendments;
- 2) The Sixth Amendment right to counsel, and its counterpart under the Michigan Constitution, Const 1963, art 1, § 20, are at least as important as the judicially created Fifth Amendment right, if not more so;
- 3) The Sixth Amendment right to counsel is considerably broader than the Fifth Amendment right;
- 4) A waiver of the greater Sixth Amendment right to counsel after that right has been invoked cannot be based solely on a waiver of the Fifth Amendment Miranda rights;
- 5) At a minimum, the protections afforded pursuant to Edwards v Arizona to an accused who has invoked his lesser Fifth Amendment right must be extended, by analogy, to the accused who has invoked his Sixth Amendment right.

The critical holding of the Michigan Supreme Court is that the Sixth and Fourteenth Amendments protect an accused from continued police interrogation after the accused has invoked his right to counsel at arraignment by requesting the appointment of counsel. This holding is consistent with prior rulings of this Court and is consistent with both the federal and Michigan Constitutions.

Initially, it is clear that Respondent Bladel was entitled to counsel at his post-arraignment interrogation. It is further clear that Respondent was advised of his Fifth Amendment rights pursuant to Miranda v Arizona, waived those rights and confessed without having consulted an attorney. Thus, Respondent does not quarrel with the proposition that there was not a Fifth Amendment violation in this case.

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4/ US Const, Am V.

Since Respondent had been arraigned, however, he was entitled to counsel at the time of interrogation pursuant to the Sixth Amendment. Kirby v Illinois, 406 US 682, 689; 92 S Ct 1877; 32 L Ed2d 411 (1972). The Sixth Amendment right to counsel is broader than the corresponding Fifth Amendment right in that the Sixth Amendment provides for legal assistance throughout all critical stages of the criminal prosecution. The Fifth Amendment right on the other hand

"protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Schmerber v California, 384 US 757, 761; 36 S Ct 1826, 1830; 16 L Ed2d 903 (1966).

Moreover, not only is the Sixth Amendment right to counsel broader in purpose and scope than the corresponding Fifth Amendment right, but also "the policies underlying the two constitutional protections are quite distinct." Rhode Island v Innis, 446 US 291, 300, n4; 100 S Ct 1682, 1689, n4; 64 L Ed2d 297 (1980).

This Court's prior decisions regarding the Sixth Amendment and police elicitation of incriminating statements from the accused establish two important distinctions between the Fifth and Sixth Amendment rights, both of which lead to the conclusion that the Sixth Amendment right to counsel is broader and more difficult to waive. In order to show a violation of the Fifth Amendment, the defendant must first show that he was subject to custodial police interrogation. Miranda v Arizona, supra, 384 US at 444. A Sixth Amendment violation, on the other hand, does not require interrogation but merely "deliberate elicitation" of incriminating statements. United States v Henry, 447 US 264, 272; 100 S Ct 2183; 65 L Ed2d 115 (1980). Moreover, such elicitation without counsel can violate the Sixth Amendment even in the absence of custody. Massiah v United States, 377 US 201, 206; 84 S Ct 1199; 12 L Ed2d 246 (1964).

The second major distinction between the two corresponding rights to counsel involves waiver. A waiver of the Fifth Amendment right to counsel can be found by a showing that the suspect was advised of his Miranda rights and subsequently answered questions without any affirmative indication of waiver. North Carolina v Butler, 441 US 369, 374; 99 S Ct 1755; 60 L Ed2d 286 (1979). In Brewer v Williams, 430 US 399; 405; 97 S Ct 1232; 51 L Ed2d 424 (1977), the Court held that the defendant did not validly waive his Sixth Amendment right to counsel where he did not affirmatively relinquish it prior to the police

officer's deliberate elicitation of incriminating statements. Thus, while the Fifth Amendment does not necessarily require an explicit waiver, the Sixth Amendment clearly does.

In Faretta v California, 422 US 836; 93 S Ct 2525; 45 L Ed2d 362 (1975), this Court, applying the knowing relinquishment standard of Johnson v Zerbst, 304 US 459, 464; 58 S Ct 1019; 32 L Ed 1461 (1937), found a valid waiver of defendant's Sixth Amendment right to counsel at trial. However, the Court emphasized that before such a waiver could be knowing, defendant:

"...should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Adams v United States, [317 US 269, 279; 63 S Ct 236, 242; 37 L Ed 268 (1942)]." Faretta v California, supra, 422 US at 335.

According to the Faretta decision then, a waiver of the right to counsel at trial requires that the defendant asserting his right to waive clearly understand the risks of proceeding without counsel and that this advice of risks be imparted by the trial judge. Unlike the requirements for Fifth Amendment waiver under Miranda where the suspect must only be advised of the right itself, Sixth Amendment waiver under Faretta requires comprehension of the risk of waiving the right. Thus, a much higher standard of comprehension is required to show waiver of the Sixth Amendment as opposed to the Fifth Amendment right to counsel.

Although this Court has never explicitly addressed the issue of whether this higher standard of waiver is applicable to pretrial waivers under the Sixth Amendment, the Court has indicated that the stricter standard is applicable to all waivers of the Sixth Amendment right to counsel. In Brewer v Williams, supra, the Court, as in Faretta, applied the knowing relinquishment standard of Johnson v Zerbst, supra, and stated:

"This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or of a critical stage of pretrial proceedings." 430 US at 404.

As the above discussion demonstrates, this Court's prior Sixth Amendment decisions clearly support the Michigan Supreme Court's conclusion that a waiver of Miranda rights is inadequate to waive the greater Sixth Amendment right. Moreover, this conclusion has support in both federal and state decisions. See e.g., United States v Mohabir, 624 F2d 1140 (CA 2, 1980); United States v

Satterfield, 558 F2d 655 (CA 2, 1976); United States v Clements, 713 F2d 1030 (CA 4, 1983); State v Wyer, 320 SE2d 93 (Va 1984); State v Sparklin, 296 Or 65; 672 P2d 1182 (1983). Contra, United States v Karr, 742 F2d 493 (CA 9, 1984); Jordan v Watkins, 681 F2d 1067 (CA 5, 1982).

The Michigan Supreme Court in this case did not undertake to define precise requirements for waiver of the Sixth Amendment or Michigan Constitutional right to counsel. The Court merely held that because the Sixth Amendment provides a greater and more fundamental right to counsel than the Fifth Amendment and because the Fifth Amendment waiver of Miranda rights is inadequate to waive the Sixth Amendment once it attaches, the Sixth Amendment right "is entitled to be protected by procedural safeguards at least as stringent as those designed for its lesser counterpart." See Petitioner's Appendix 23a.

One of the primary safeguards of the Fifth Amendment right to counsel and a direct result of this Court's landmark decision in Miranda v Arizona, supra, is the rule of Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed2d 378 (1981). In Edwards, a confession was obtained by continued police interrogation after defendant had advised the police of his desire to have counsel present. This Court found that the continued interrogation in the absence of counsel violated defendant's right to counsel under Miranda v Arizona, supra. The Court stated its holding as follows:

"We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, supra, 451 US at 484-485.

It is entirely logical and consistent with the federal and Michigan Constitutions to extend the Edwards Fifth Amendment rule to situations implicating the Sixth Amendment right to counsel as the Michigan Supreme Court has done. The distinctions drawn by Petitioner, that Edwards should be limited to Fifth Amendment cases only and that Respondent herein did not direct his request for counsel to the police but to a judge, do not support his conclusion that the

strict requirements of Edwards cannot apply to an indicted defendant who has "only" invoked his Sixth Amendment right. As the Michigan Supreme Court stated:

"Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation of a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. As Justice Marshall noted, if we are to distinguish cases solely on the wording of an accused's request and to whom it is made, the value of the right to counsel would be substantially diminished." See Petitioner's Appendix 21a.

Indeed, Petitioner's argument not only "makes little sense," it is inherently illogical. Petitioner would have this Court hold that for purposes of waiver of the Sixth Amendment, the Fifth Amendment waiver designed by the Miranda decision is adequate. However, for purposes of protection from continued police interrogation after the Sixth Amendment right to counsel has been invoked, the Fifth Amendment protections contained in the Edwards decision are not appropriate. As the Michigan Supreme Court found, this argument ignores the differences between the two separate rights and in fact, denigrates the Sixth Amendment right. The Edwards rule was properly extended by the Michigan Supreme Court to situations where the accused requests counsel at arraignment.

Accordingly, it is clear that Respondent Rudy Bladel did not knowingly waive his Sixth Amendment right to counsel or his Michigan constitutional right to counsel prior to being subjected to police interrogation. Moreover, because Respondent had clearly requested that counsel be appointed, he was entitled to be protected from further police-initiated questioning particularly where Respondent had spent three days in jail following his request for an attorney without having had the opportunity to consult with an attorney. The Michigan Supreme Court decision affirming these principles and requiring that the Sixth Amendment right to counsel be at least as scrupulously honored as the Fifth Amendment right, accurately interprets both the federal and state constitutions. There is no need for this Court to review that decision.

**CONCLUSION**

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

By:   
**F. MARTIN TIEBER**  
Deputy Defender

  
**RONALD J. BRETZ**  
Assistant Defender  
720 Plaza Center  
125 West Michigan Avenue  
Lansing, MI 48913  
(517) 373-2463

Counsel for Respondent

Dated: April 30, 1985